
SECTION II

MAJOR ISSUES FACING THE MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE

INTRODUCTION

As discussed in Section I, the MCPD had both formal and informal goals for this project. The formal goals (i.e., those announced in the proposal solicitation) were to identify opportunities for improving representation services, minimize the costs of those services, and demonstrate public value. The informal goals were more specific, but related to the formal goals, and included:

- Addressing the issue of MCPD autonomy;
- Reviewing the MCPD's organizational and management structure and making suggestions for changing the structure to make operations more effective and efficient;
- Making recommendations on how to measure overall effectiveness (e.g., better approaches to case weighting and counting);
- Identifying and evaluating the court's concerns and developing suggestions for addressing those that were valid and those that were not;
- Suggesting mechanisms for dealing with excessive caseloads; and
- Making recommendations about other challenges facing the office (e.g., relationship between attorneys and support staff, horizontal v. vertical representation, delayed minute entries) that would improve office performance.

In order to achieve these study goals, the PSI study team first conducted an assessment of the MCPD, which included both a review of internal operations and external relations with other justice system agencies. Among the external agencies, the court had particular complaints about the performance of the MCPD that needed to be examined to determine whether they were grounded in fact or whether they were the result of misunderstanding or misperceptions.

This section discusses the results of our assessment of MCPD internal operations. This includes a discussion of the Office's strengths as well as the challenges it needs to address to improve its performance. We believe the strengths are important aspects of

any assessment because (1) the MCPD is a product of both its strengths and weaknesses, (2) the strengths will be important assets in initiating and sustaining improvement efforts, and (3) the strengths can be a model for how things are done well, provide ideas for how to introduce change successfully and effectively, and provide optimism that things can be better. In sum, it is critically important to build on the MCPD's strengths in designing and implementing a successful performance improvement plan.

STRENGTHS OF THE MCPD

The PSI study team's focus was primarily on identifying and examining the challenges facing the MCPD, both internally and externally, challenges where improvement efforts would increase the MCPD's efficiency and effectiveness, ideally at reduced cost. It is not prudent to undertake that effort, however, without also observing the strengths of the Office and realizing that what may be a weakness or challenge in one context, may be a strength in another (e.g., management structure). Among the most important strengths we identified through all our information gathering is the committed, dedicated, skilled people who manage and staff the MCPD. The success of any improvement plan will depend heavily on the creative energies of those staff and their willingness to cooperate with and participate in efforts to address some of the major challenges successfully.

Exhibit II-1 presents a list of the major strengths that the PSI team identified as part of its data collection effort. The strengths are listed to help balance the discussion of challenges that follows and so that the MCPD (and other stakeholders in the criminal justice system) can use the strengths to promote positive change and enhance (rather than detract from) those strengths. The strengths are also listed to ensure that readers of this report do not lose sight of the many significant things the MCPD is doing well.

EXHIBIT II-1 STRENGTHS OF THE MCPD

- There is an experienced, dedicated management team, committed to delivering high quality defender services to clients.
- MCPD staff are hard working, dedicated and competent.
- The MCPD has effectively responded to interim recommendations made by the PSI study team.
- Management is open to new ideas and willing to implement best practices.
- Employees are generally satisfied with their jobs and have a high regard for their immediate supervisors and for MCPD management.
- The cost per case for defender services has been remarkably stable over the years and may even have declined.
- There is a good training program.
- There is a comprehensive *Practice and Procedure Manual* for MCPD attorneys and staff.
- The MCPD makes effective use of exit survey information for office improvement.
- The MCPD has a good computerized case counting system.
- There are written strategic planning processes.

MCPD Management

The PSI study team found that the MCPD has benefitted from a dedicated, experienced senior management team that is committed to achieving and demonstrating public value and delivering high quality defender services. There are many examples that illustrate this commitment. One of the most important to the County is the management team's efforts to demonstrate fiscal accountability by developing a framework to analyze its caseload, determine its workload, and allocate its resources to minimize costs. The MCPD also has committed itself to investigating and developing various devices to measure its performance, including benchmarking, a point system for measuring attorney performance.

With regard to client representation, MCPD management developed an innovative, proactive, sophisticated, self-funded, public defender program designed to improve assessment of its juvenile clients who were transferred into adult court. Further, as

illustrated in past memoranda and in discussions with staff, the MCPD has identified a number of innovative practices it believes could improve its services to clients.

Further, the MCPD has established several outreach efforts to the public and the justice system community, including creating (1) a Community Relations Coordinator position, (2) a Legislative liaison position, (3) a speaker's bureau, and (4) customer surveys for clients and judges. As part of its outreach activities, the MCPD organized a 1½-day conference entitled "Creating Public Value: Changing Attitudes and Public Perceptions" and then conducted a follow-up, communication skills seminar.

Attracting and Retaining Hard-Working Competent Staff

Given the extraordinary difficulty of attracting and retaining a competent, dedicated staff of attorneys and support personnel, the high quality of MCPD staff is clearly a significant management accomplishment. This is especially notable in light of the constraints under which MCPD management is required to operate, including compensation constraints and high workloads. The PSI team had an opportunity to interview a large number of MCPD staff members and was very impressed with the quality of those individuals.

Our evaluation is consistent with comments made by other criminal justice system personnel we interviewed outside the MCPD. It is further consistent with findings from a 1993 study of the MCPD.²

Responsiveness to the PSI Study Team

MCPD management has been extremely cooperative and responsive to the PSI study team. This is true both in terms of providing and gathering information for us and in its responsiveness to our numerous recommendations and suggestions. Management embraced this study, encouraged constructive criticism, and willingly considered different points of view. It has even begun to act on some of those recommendations, showing leadership inside and outside the department. For example, in mid-May it experimented with a new discovery motions policy and implemented a horizontal

² Spangenberg, *supra*, note 1.

representation pilot project. It has also made suggestions to frontload case management and proposed conducting a retreat for key criminal justice leaders.

Leadership and Innovation

Numerous memoranda document the MCPD's continuing efforts to improve criminal justice case processing and court procedures. To us, the ideas reflected in those memoranda indicate strong leadership from the Public Defender and a willingness to change if that change can lead to better representation services.

As an example of this willingness to change, the MCPD has participated in national level efforts to develop means to demonstrate public defender value and has had a national organization conduct a workshop for that purpose in Maricopa County. Also, following the conclusion of our study, the MCPD is planning to conduct a series of strategic planning seminars for managers to follow up on the study's improvement recommendations.

High Levels of Employee Satisfaction

The results of the Employee Satisfaction Survey appear to show relatively high employee satisfaction with (1) MCPD management, especially in contrast with other county departments, (2) the people they work with, (3) the kind of work they do, (4) their feeling of accomplishment, and (5) their ability to make decisions.³

MCPD Cost per Case

Contrary to expectations that the cost per case of delivering defender services would increase over time, the MCPD has been able to control costs well. For example, between 1994 and 1997 the average total cost per case in the trial division fell from \$591 to \$528. This should be considered a superior achievement of MCPD management over the long term, even though this year the lack of increase will be partly due to increased turnover beyond management's control.

³ Maricopa County Employee Satisfaction Survey 1999-2000: Public Defender, Graph 4-Public Defender Management. (Attached as Exhibit B-1 in Appendix B.)

Comprehensive Training Program

The MCPD has developed a comprehensive training program that is much better than the training programs in many defender offices. It offers new and existing attorneys comprehensive staff development and training programs, which include a focus on ethics and professionalism.⁴ All seminars conducted by the MCPD are open to other indigent defense attorneys throughout the state. Its new attorney training and trial college, for example, provides training to Maricopa County Indigent Representation Agency (IRA) and other indigent defense attorneys. The program is headed by a knowledgeable and dedicated training director.

Comprehensive MCPD *Practice and Procedure Manual*

The MCPD has a written and fairly comprehensive *Practice and Procedure Manual*. The style and content are generally good and compare quite favorably with manuals used by other defender offices. Additionally, the development of the manual is consistent with and responsive to Spangenberg's recommendation that the MCPD establish "appropriate written policies and procedures for the operation of the office beyond simply personnel policies and procedures," including a written conflict policy, job descriptions and "minimum performance standards and the objective evaluation measures for its attorneys and staff."⁵

MCPD Attorney Exit Survey

We are impressed that the MCPD conducts written, attorney exit interviews, tallies the results, and makes effective use of the data for management purposes. The exit surveys are of high quality. Many public defender agencies nationally do not conduct exit interviews and, of those that do conduct them, few make as effective use of the information gathered as the MCPD.

⁴ "The defender organization should offer training and develop materials on ethics and professional responsibility. . . ." Standard 3.2– Ethics and Professional Responsibility, NLADA Defender Training and Development Standards (1997).

⁵ Spangenberg, *supra*, note 1, p.14-16.

Case Management System

MCPD has a good computerized case counting system and, equally important, management has good procedures in place to verify data integrity. Having a computerized case management system is crucial for developing a reliable methodology for measuring workload. However, it was difficult to compare MCPD's caseload to the other IRA departments and the Maricopa County Attorney's Office (MCAO) because we did not find a uniform description of a case used by the MCPD or the Maricopa County criminal justice system.

Written Strategic Planning Processes

MCPD's strategic planning process, including the tools it uses to capture information for planning (e.g., attorney exit surveys), and the resulting written plans are impressive. The MCPD has clear vision and mission statements, a set of strategic goals that it updates quarterly, and a system in place to monitor progress in achieving those goals. These processes are the necessary foundation of good management and for effecting improvements in the system.

MAJOR CHALLENGES CONFRONTING THE MCPD

In Maricopa County, the criminal justice system is highly fragmented. This fragmentation is due in part to the organization of the courts, which are divided into the Municipal Court, many justice courts, and the Superior Court. Further, within the Superior Court, the judicial function is spread across various types of judicial officers with varying degrees of responsibilities that sometimes overlap and create confusion regarding legal processes. These divisions affect the way other agencies in the justice system are organized, which may not be optimal in terms of their efficient and effective use of resources. (The challenges facing the MCPD that are created by the operations of other agencies are discussed more fully in Section VI.)

The indigent representation function has its own set of challenges, many of which are unrelated to the courts or the organization of other criminal justice services. One of the most perplexing is the structure of the IRA and the division of labor among the MCPD, the Office of the Legal Defender, the Legal Advocate, and the Office of Contract Counsel.

Table II-2 below highlights some of the major challenges we believe the MCPD faces based on our study findings.

EXHIBIT II-2 CHALLENGES FACING THE MCPD
<ul style="list-style-type: none"> • The MCPD lacks autonomy. • The MCPD organizational structure needs to be re-examined to better support the MCPD's functions and help it achieve its goals. • The MCPD should provide more early representation. • Staff turnover rates are high. • Personnel and compensation issues are obstacles to increasing MCPD efficiency and effectiveness. • Additional classes of personnel are needed to run the MCPD effectively and efficiently. • The management information system has some good features, but it needs to be upgraded and enhanced. • Expanding training, especially to cope with staff turnover, is needed. • The case counting and weighting approach needs to be re-evaluated. • The MCPD struggles with excessive caseloads.

MCPD Autonomy

Autonomy is the key to a public defender's structural and professional integrity.⁶ The degree of autonomy directly reflects the degree of real respect for the defense function and the defender department. Autonomy is a necessary precondition to defender accountability and professionalism.

Defender autonomy is synonymous with defender authority and discretion. That authority should be used by MCPD management to ensure professionalism, which, at

⁶ See *Polk County v. Dodson*, 454 U.S. 312 (1981); and Standard 5-1.3, Professional Independence of the *ABA Standards for Criminal Justice, Providing Defense Services*, Third Edition (1992) (cited hereinafter as ABA Defense Services Standards).

a minimum, requires independent, professional judgment and compliance with appropriate national standards.

In our opinion, defender autonomy in Maricopa County is lacking in several ways:

- Absence of a fixed term of office
- External selection of the Public Defender
- No control over the budget
- Fragmented indigent representation structure.

Fixed Term. A fixed term of office of appropriate length is necessary to promote the independence and effectiveness of the MCPD and of the defense function.⁷ Yet, the public defender is a county employee who serves at the pleasure of the County Administrator, in contrast to many other leadership positions in the justice system (e.g., County Attorney, Presiding Judge). The fact that the prosecutor has a relatively long, fixed term is the sort of status factor that, in an adversarial system, will create or exacerbate an imbalance in favor of the prosecutor. In Maricopa County, this imbalance is exacerbated by the fact that the county attorney is an elected official and is therefore somewhat insulated from county administrative demands.

Practice in other jurisdictions varies, but fixed terms are common.⁸

External Selection. In our opinion, autonomy and effectiveness would be greatly enhanced if the Public Defender were selected, and the MCPD (and the larger IRA)

⁷ See ABA Defense Services Standard 5-4.1, which provides “The chief defender should be appointed for a fixed term of years and be subject to renewal. Neither the chief defender nor staff should be removed except upon a showing of good cause.”

⁸ See e.g., Office of Justice Programs, *Improving Criminal Justice Systems through Expanded Strategies and Innovative Collaborations*, Report of the National Symposium on Indigent Defense (Washington, D.C., February 1999), and The Spangenberg Group, *Statewide Indigent Defense Systems: Organization and Structure*. Examples of PD terms in other states: (1) New Jersey and Wisconsin provide for a five-year term, (2) Illinois, Iowa, Kentucky, Minnesota, Missouri, Nevada, Oregon, South Carolina, Vermont provide for a four-year term, and (3) Alaska and Idaho provide for a four-year term and removal for good cause. Also, some public defenders are elected on the same basis as their prosecutor counterparts (e.g., in Florida and Tennessee).

were supervised by, an autonomous board or commission, as suggested by national standards.⁹

Budget Control. The expectation that the MCPD will meet national workload standards must be based on a budget approach that meets comparable standards.¹⁰ The MCPD budget process does not meet those standards because it lacks autonomy from other IRA departments, the controller and Maricopa County. Indeed, the budget process for the IRA aggregates the budgets for all the departments into a single budget request. This process exacerbates the problems of the IRA structure, since the four, ostensibly autonomous, department directors are responsible for maintaining the financial integrity of their respective departments and they frequently have competing and dissimilar interests.

Not only does the MCPD lack autonomy in the budget process, it lacks its own budget personnel and autonomy regarding the expenditure of funds allocated to it. This is contrary to national standards.¹¹ The primary budget official within the MCPD is an employee of the controller who works closely with OMB. This awkward reporting situation may tend to generate inequities, mistrust, confusion and lack of accountability. Furthermore, the existing structure and procedures may pose ethical questions relating to, for example, confidentiality and autonomy.¹²

Fragmentation. As noted above, the IRA consists of four departments that operate and are managed independently of one another. It is difficult to understand how the

⁹ See, e.g., ABA Defense Services Standard 5-1.3(b) and *Guidelines for Legal Defense Systems in the United States*, National Legal Aid and Defender Association, 1976, Guidelines 2.10 and 2.11. (Cited hereinafter as Defense Systems Guidelines.)

¹⁰ “The defender system should be an independent agency and, as such, should prepare its own budget and submit its budget directly to the appropriating authority.” Defense Systems Guidelines 2.18(a), Administration of Defense System Funds.

¹¹ “The defender system should operate under an annual or biennial lump sum appropriation which would enable the Defender Director to reallocate funds without prior approval of the appropriating authority.” Defense Systems Guidelines 2.18 (a), Administration of Defense System Funds.

¹² See Arizona Bar Ethics Opinion # 93-06, 1993
<http://www.azbar.org/EthicsOpinions/Data/93-06.pdf> (1993 opinion is attached in Appendix C.)

MCPD's fiscal performance can be evaluated separately from the other IRA departments when their budgets are co-mingled.

MCPD Office Structure

As a result of our review of the MCPD's internal operations, we believe the present organizational structure needs to change in order to better address several issues, including: (1) early representation in casework, (2) resource allocation, (3) span of management control, (4) operations and development, and (5) criminal justice system cooperation and integration. In the next section of this report, we present an alternative model for MCPD's organizational structure in order to stimulate the MCPD's critical thinking about its structure, processes and functions and help it achieve its goals.

Client Representation

The period from arrest to arraignment is crucial to establishing a meaningful attorney-client relationship, protecting clients' interests, and frontloading the system to promote the early disposition of cases. In our opinion, earlier attention to clients (i.e., prior to arraignment) would allow defenders to deal more effectively with motions for release and medical or other conditions. Yet, neither the MCPD nor the MCAO appear to have attorneys in attendance even at the initial appearance. Furthermore, where MCAO representation is horizontal, there is no one public defender attorneys can contact for plea negotiations, and motions must be sent to the trial group supervisor.

Internal MCPD Operations

We spent considerable effort reviewing the internal operations of the MCPD to identify areas for possible improvement. We found some areas that were mostly outside the control of the Public Defender (e.g., staffing and salaries) and others that could be addressed internally.

Staff Turnover. Turnover has been a major problem for the MCPD for at least the last five years. The attorney turnover rate has apparently reached crisis proportions recently. The MCPD lost 22 attorneys and 39 support staff from July 1999 through February 2000. During the course of our study, the MCPD has seen even higher

turnover: 22 attorneys in the second quarter of 2000, including 12 attorneys in the last 30 days of that period.¹³

Our review of attorney exit questionnaires from 1999 through August 2000 showed that inadequate pay and overwork are two of the reasons cited most frequently for resignation from the MCPD.¹⁴ Most of the attorneys who volunteered to list their salary at resignation and compensation at their new job received increases of at least \$10,000, about 20 percent or more above their MCPD salary.¹⁵

Attorneys typically leave at or before the start of their third year in the office. This is about the time they are just beginning to return the MCPD's investment in recruitment and training. Interviewees attributed the high turnover in the early years of employment to a combination of high student loan payments and a buyers' job market. Exhibit II-3 displays turnover rates for selected MCPD positions in 1997.

Exhibit II-3 1997 Staff Turnover Rates	
<u>Position</u>	<u>Turnover Rate</u>
Attorney 1	50%
Attorney 2	23%
Legal Secretary 1	63%

¹³ See "Annual Trial Attorney Turnover Rates" which shows a constant, high level of attorney turnover at about 20 percent. In recent quarters, however, turnover has escalated to a point at which the MCPD projects a 45 percent attorney turnover rate. This rate is untenable and destructive of the institution and its function. (See Exhibit B-2, Appendix B.)

¹⁴ An assistant public defender included this observation in an exit questionnaire in 1999: "As you know all too well, the lack of opportunity to increase salary levels is what causes most lawyers to leave the office just about the time they have become really good trial lawyers. At the point in time when they leave, the "fairness" of their salary based on their ability, their experience and the complexity of the cases that they are handling is usually inadequate and that is why they leave."

¹⁵ The specific differences in salary were: \$44,000 to \$57,500; \$44,600 to \$55,000; \$50,000 to \$62,000; \$80,000 to \$115,300; \$68,000 to \$68,600; \$54,000 to \$53,000; and \$55,000 to \$65,000.

Inexperienced employees reduce efficiency and effectiveness and increase costs.¹⁶ In addition to the costs of training, there are the costs for recruitment, hiring, and supervision of new staff. The inefficiency caused by having to shift entire caseloads to new attorneys causes delay, and reduces the quality of representation and professionalism. Some specialized positions (e.g., Legislative Relations Coordinator) can only be performed optimally by people who have developed personal relationships over a period of time.

Staffing Pattern and Salaries. It appears that personnel and compensation issues are chronic, key obstacles to MCPD effectiveness. Historically, from 1991 through 1997, the number of MCPD attorneys failed to keep pace with the growth in the number of deputy county attorneys and judges. While this fact does not take into account the allocation of additional resources to non-MCPD indigent representation entities such as the Legal Defender Office, it is the MCPD that is most often criticized if client representation is not effective.

It was obvious from our review of salary levels that MCPD salaries are not competitive with those in the private sector and, often, with those in the public sector. While defender offices generally cannot compete with certain aspects of private practice or even government service in terms of salary, the MCPD should not be at a competitive disadvantage with the Legal Defender Office, the City of Phoenix municipal defender, and contract attorneys doing similar work. Yet, it is. Findings from attorney exit surveys indicate that the opportunity cost of working at the MCPD is very high. It is, therefore, not surprising that even dedicated attorneys who would like to continue their employment with the MCPD must leave due to financial pressures. The salary levels are not only inadequate to retain experienced attorneys, but we question whether they are adequate to hire qualified, new attorneys. The existing benefits are satisfactory to most of those who responded to the exit survey.

Salaries for support staff also seem low relative to the market, but are not as out of line as are attorney salaries. Maricopa County's Human Resources Department has confirmed the low salaries in wage surveys the last two years. For example, in fiscal year 1998, the County was paying entry-level legal secretaries more than \$2.00 per hour

¹⁶ See "Comparison of Trial Attorneys With Less than 2 Years of Experience," showing a dramatic increase in the percentage (from 13% to 25%) of inexperienced MCPD attorneys. (Exhibit B-3, Appendix B.)

less than market rates. In 1999, the Department determined that the County was paying entry-level attorneys almost \$6,000 per year below market.

High and increasing employee turnover is a symptom of low pay relative to comparable positions. The conclusion seems clear: raising salary levels for staff will most likely reduce turnover. A market survey, as part of an overall office compensation study, is clearly needed to establish a new pay scale.

Classes of Personnel. The MCPD has grown rapidly, but its classes of personnel have failed to keep pace with this growth. The existing MCPD leadership—the senior management team—appears to be doing at least an adequate job and spending a considerable amount of time meeting the administrative demands of Maricopa County. We believe, however, that the senior management team should be able to give greater emphasis to internal MCPD operations. In our opinion, the MCPD administration’s effectiveness, as well as its autonomy, would be greatly enhanced by staffing the organization with the appropriate numbers and types of administrative personnel. We noted, for example, that the MCPD has no budget officer or public information officer, positions we believe are important to improving communications with outside agencies, educating the public about MCPD services, and improving fiscal accountability.

Automation. The lack of access to an efficient and effective criminal justice information system (CJIS) is a source of MCPD management and operational inefficiency. We understand that the county is designing a new CJIS and we believe the County Administrator should encourage the MCPD and other justice system agencies to continue to participate in the CJIS design and work closely with the County’s Chief Information Officer. One major improvement, in our opinion, would be for the County to consider making criminal histories, police reports and other information that now contribute to delay available in a digital form that the MCPD could access.

Training. Although the MCPD provides a considerable amount of training to its staff, national standards suggest that it should do more. Additionally, this training should be developed within the context of a comprehensive written plan. Even though the MCPD has a written *schedule* for attorney training that projects into the future, it does

not appear to have a comprehensive *plan* for training, especially one that would include training for support personnel.¹⁷

High employee turnover and inexperience dramatically increase the need for training. It does not appear that the MCPD has had time to adjust the projected costs of this training or that the County has budgeted funds for it. For example, the County procedure manuals include education costs (\$50) for new attorney hires, but not training costs. This is especially significant because the three-week orientation for new attorneys is a very substantial cost.

Case Counting and Weighting

The MCPD's case counting system is similar to that used by other criminal justice agencies in Maricopa County and by most other jurisdictions in the United States. The differences lie in the definition of a "case" used by each agency and the evaluation of the amount of work involved. MCPD needs to develop an approach to case counting and weighting that accounts for the amount of time required to represent clients, reflects the complexity of the cases that comprise its workload, and provides context for interpreting its data. The issues relating to the development of such a case counting and weighting approach are more fully developed in Section IV.

DEALING WITH EXCESSIVE CASELOADS

This subsection discusses methods for designing and implementing effective mechanisms to deal with excessive caseloads. Important first steps include: establishing appropriate standards to define "excessive caseload" within the MCPD's local context and designing effective implementation mechanisms. Each of these aspects has significant budgetary and political implications, not only for the MCPD, but for Maricopa County and other criminal justice entities. The complexities of establishing appropriate case counting and case weighting standards are dealt with elsewhere in this report. Obviously, not all of the following discussion will be

¹⁷ NLADA Training and Development Standard 1.2– Written Training Plan, provides: "Every defender organization must have a clear, written plan which includes specific goals and objectives, for offering training opportunities to all employees."

applicable in Maricopa County at this time. All of it, however, is potentially constructive and should be seriously considered by the County, courts and MCPD.

It is clear that neither public defenders nor their staff attorneys can constitutionally or ethically be required to handle an excessive caseload. Once an excessive caseload problem is identified, a public defender has an ethical obligation to diligently pursue all reasonable means of alleviating it.¹⁸

Excessive caseloads are of the greatest significance because they are inherently destructive of constitutional and professional standards: they promote inefficiency, ineffective representation and create untenable conditions that adversely affect employee retention. Excessive caseloads may also have deleterious consequences for other criminal justice entities (e.g., by contributing to delay). Therefore, national and state standards for indigent defense, designed to protect the integrity of the judicial system and our free society, have addressed these issues in the most serious terms.¹⁹

The Arizona Supreme Court has established *maximum* caseload standards: 150 felonies (and 300 misdemeanors) per attorney-year.²⁰ This is similar to maximum felony caseload standards adopted by various commissions and jurisdictions, for example:

¹⁸ See NLADA Defense Systems Guidelines 5.3, Elimination of Excessive Caseloads; ABA Defense Services Standard 5-5.3, Workload.

¹⁹ NLADA Guideline 1.3, General Duties of Defense Counsel, recognizes the necessity of sufficient time to provide representation, counsel's ethical obligation to refuse additional work; and (in the commentary) an attorney's ethical obligation to report other attorneys who violate excessive workload standards to the bar. The commentary to guideline 1.3 cites the NLADA Standards for Defender Services: "No defender office or defender attorney shall accept a workload which, by reason of the excessive size thereof, threatens to deny clients due process of law or places the office or attorney in imminent danger of violating any ethical canons. . . ." See also ABA Defense Services Standard 5-5.3; *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130 (Fla. 1990) (recognizing that an excessive caseload creates an ethical conflict of interest requiring withdrawal).

²⁰ *State v. Joe U. Smith*, 140 Ariz. 355, 681 P.2d 1374, 1380 (1984); See also J. Stookey and L. Hammond, "Rethinking Arizona's System of Indigent Representation," *Arizona Attorney* (October 1996) p.28.

- The National Advisory Commission (NAC) on Criminal Justice Standards and Goals adopted the following standards: 150 felonies, 400 misdemeanors and 200 juvenile cases.²¹
- These NAC standards were subsequently adopted by an ABA committee studying the criminal justice system, but the committee recommended 300 (rather than 400) misdemeanors.
- The Florida Commission on Criminal Justice Standards and Goals adopted the following standards: 100 felonies, 400 misdemeanors, 200 juvenile cases.²²
- A recent study, under the auspices of the National Center for State Courts, found considerable variation among states in their caseload standards. For felony cases, the standards ranged from a low of 120 cases per attorney in Minnesota to 241 cases per attorney in Colorado.²³

These maximum caseload standards vary from jurisdiction to jurisdiction depending on local factors, including court and prosecutorial staffing, structure, practices and procedures; and defender resources. For example, the authority of Florida defense attorneys to subpoena all felony prosecution witnesses for deposition enables those attorneys to handle a higher number of cases than would be practicable in the same jurisdiction without depositions. Additionally, in Portland, Oregon the ratio of support staff to attorneys—including administrative staff—is 1.4:1.0 so that each felony attorney has an investigator and trial assistant. Factors influencing the weight or complexity of cases are discussed more fully in Section IV below.

The MCPD provided us with data indicating that its trial caseloads have exceeded Arizona maximum caseload standards every year from FY 1993 to the present.²⁴ The excessive caseload has ranged from 8 to 37 percent, and in the last three years has been

²¹ National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (1973).

²² Standard CT 10.12, *Courts*, Florida Commission on Criminal Justice Standards & Goals (1976).

²³ The Spangenberg Group, *Tennessee Public Defender Case Weighting Study, Final Draft Report*, Table 6-4 (West Newton, MA: April 1999). See state-by-state comparisons of maximum workload standards in Appendix D.

²⁴ See “Trial Division Annual Caseloads vs. Smith Standard” showing excessive caseloads over five years from 1995 to 2000 and “Public Defender Percent Over Joe U. Smith Standards.” (Exhibits B-5 and B-6, Appendix B.)

more than 30 percent.²⁵ Exhibit II-3 below shows the average felony caseload per attorney year since 1995 and the percent over the Smith Standard that caseload represents.

EXHIBIT II-3 EXCESSIVE CASELOADS OVER FIVE YEARS: 1995-2000							
Caseload Data (avg. per attorney year)	Fiscal Year						
	1995	1996	1997	1998	1999	2000	2001*
Felony caseload	180	172	199	206	199	209	212
% over Smith Standard	19.8%	15.0%	32.8%	37.4%	32.5%	39.2%	41.0%

* Data for July and August 2000 only.

In the period from 1994 through 1997,²⁶ the MCPD made successful formal and informal efforts to withdraw from an excessive caseload. A small portion of the MCPD's excessive cases were administratively transferred from the MCPD to the Legal Defender and the Office of Contract Counsel. Since 1997, the MCPD apparently has continued to accept appointment to all cases without workload withdrawals, and maintains the highest average caseloads per attorney of any IRA department.

RECOMMENDATION 1

Maricopa County and the MCPD should incorporate administrative mechanisms into their budget process that would avoid excessive MCPD caseloads. This should include the development of appropriate standards and procedures, determination of a reasonable caseload, and defender administrative authority not to accept a higher caseload.

²⁵ *Ibid.*

²⁶ In 1993, a Maricopa County consultant observed, "I want to state in the strongest possible terms that I believe that the Maricopa County Public Defender office is a substantially understaffed and underfunded. . . ." Spangenberg, *supra*, p.11. Both defender caseloads and appropriations have changed dramatically in the interim.

RECOMMENDATION 2

The MCPD should not continue to require its attorneys to maintain caseloads in excess of Arizona maximum caseload standards, if in the professional judgment of the Public Defender such caseloads are actually excessive. It is imperative, however, that—to the extent circumstances permit—prior to seeking to withdraw from an excessive caseload, the Public Defender determine whether modifying departmental organization and priorities, reallocating available resources, and seeking additional resources and systemic changes would reduce his attorneys' caseloads to appropriate, professional levels. If it becomes necessary, the MCPD should seek external assistance in establishing a mechanism to deal with excessive caseload, including the development of appropriate standards, procedures and cost-effective remedies, prior to these problems rising to crisis proportions.

Optimally, the issue of excessive caseload will have been anticipated and a mechanism for dealing with it will have been established by the public defender, its funding entity and others who affect defender workload. While this may seem obvious, many criminal justice systems have been unwilling to address excessive caseload issues until there is a crisis, and then must devise a response in haste and under political pressure.

Sound management principles and common sense require that excessive caseload problems be anticipated. Defender caseloads are somewhat unpredictable. Numerous factors external to the PDO, (e.g., the crime rate, budget process, prosecution charging policies, and judicial standards and procedures) may contribute to the development of an excessive caseload. Designing mechanisms in the midst of a crisis greatly reduces the likelihood of an objective, deliberative process and moderate, cost-effective remedies. In practice, a crisis often requires resort to extreme measures, such as defender withdrawal from cases, that might otherwise have been avoidable. In Florida, certain jurisdictions have established procedures in anticipation of excessive caseload problems, while others have not. At least one Florida jurisdiction that refused to establish procedures prospectively has found itself repeatedly enmeshed in protracted litigation.

The ideal approach is preventive and would be incorporated in a realistic budget process. The mechanism involves determination of a reasonable caseload and defender

authority not to accept a higher caseload. For example, the Metropolitan Defender Service in Portland, Oregon has an established contract quota. This mechanism involves non-appointment, rather than defender withdrawal.

This approach could be based on procedures similar to the following:

- The defender would establish a workload for the next budget period.
- The workload would be measured from two points of view: pending and annual. This workload could be determined by numbers of cases, case weights or any other easily established measuring system. (This workload might be adopted or affirmed by the court as meeting national and state standards.)
- The workload limit would be acknowledged in the budget in the form of a note allowing the defender to refuse to accept new cases if the projection of case assignments would surpass the established limit and would require renegotiation of the budget for any additional cases.

The projection should probably be on a monthly basis and the initial limit should be set on the extreme high side of appropriate workload. The calculation might provide for a margin of error in any month of about 5 percent. This would allow the defender to guarantee staff a relatively level case flow and that the case projection will be met even if the number of cases decreases in some months.

The adoption of this approach in Maricopa County would have the advantage of setting appropriate work levels in a more neutral, deliberative manner than may be possible in a crisis situation. It would also permit criminal justice system budgets to be based on a comprehensive and integrated, systemic approach. That is, the courts and the prosecutor could also operate on a similar basis to ensure adequate funding.

If no mechanism can be adopted to anticipate and avoid the development of an excessive caseload, the best response will depend on the earliest identification of any problem and the most expeditious implementation of the most effective response. Such a mechanism limits the damage to defender clients and the judicial process, and minimizes the magnitude of any case management and funding problems. Its

implementing procedures will necessarily have taken into consideration several issues, including:

- Will the excessive caseload determination be made automatically when defender caseloads reach a predetermined limit or will the decision be left to the professional judgment of the public defender?
- If the decision is within the independent, professional judgment of the public defender, how is the decision to be implemented? That is, must the public defender's exercise of discretion be ratified by a court, thus providing a check on the basis for the public defender's determination?²⁷
- If ratification by a court will be required, will ratification be required only when the number of cases affected is so substantial as to affect the sound administration of justice by the courts? Which judge or judges would make the ratification decision?
- What standard would the judge apply in deciding whether to ratify the public defender's exercise of professional judgment regarding his workload? That is, would the public defender's exercise of discretion be entitled to a presumption of correctness? If so, how strong a presumption of correctness? It is essential that the defender's judgment that his caseload is excessive be granted substantial deference. In Florida, the courts give such a motion a "strong presumption of correctness" and will not second-guess the professional judgment behind it, except in the "most unusual circumstances."²⁸

The conclusion that an excessive caseload exists presupposes that the defender agency has examined and optimized its internal operations and priorities. This implies that once an excessive caseload is determined to exist, additional resources must be allocated to address it. Because seeking additional resources may itself be problematic,

²⁷ See Ethical Rule 5.4(c) of the Arizona Supreme Court's *Professional Rules of Conduct*, regarding a lawyer's professional independence, which provides: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

²⁸ *In re Certification of Conflict in Motions to Withdraw Filed by the Public Defender*, 636 So. 2d 18, 23 (Fla. 1994)(Harding, J., concurring).

the excessiveness should be substantial, rather than marginal, and be clearly demonstrable. It may also be advisable for the defender agency to be in a position to show that it has effectively experimented with practical short-term responses (inside and outside of the agency) in order to attempt to become more efficient and to deal with the excessive caseload and that these measures have been unsuccessful. The defender agency may consider requesting emergency assistance from voluntary bar associations, but this approach has often proven to be ineffective or of marginal benefit.

Excessive caseload problems are often simply a reflection of inadequate defender resources, and additional attorney time will be at the core of any meaningful remedy. These resources may be allocated directly to the public defender or the defender may be permitted to withdraw. Even when the defender is not appointed, additional attorney resources must be allocated to those cases. Defender non-appointment or withdrawal may be a necessary and appropriate response to the public defender's ethical and professional dilemma. From a systemic point of view, non-appointment or withdrawal recognizes and dramatizes the problem and calls for immediate, constructive action. The procedures established should take into consideration:

- the source of funding for the contingency plan,
- the talent pool from which to draw attorneys and support staff competent to handle the excessive caseload on short notice,
- what entity would be responsible for recruiting, hiring and supervising the required personnel, and
- whether the required personnel would be employed as government or private attorneys.

Excessive caseload problems are best dealt with through effective mechanisms developed at the local level. These matters may also be brought to the attention of state entities, such as the Arizona Bar or Arizona Attorneys for Criminal Justice, or to national entities, such as the American Bar Association, National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers, and the American Civil Liberties Union. These organizations have demonstrated their concern about constitutional and professional standards, and may offer to help with appropriate

rules, procedures or ethics opinions; provide other technical assistance; and, in extreme cases, may be willing to institute litigation.²⁹

Theoretically, it would be possible for the MCPD to reject or modify applicable caseload standards or meet appropriate standards by reallocating resources. This might permit the Public Defender, in the exercise of his professional judgment, to determine that his resources were adequate and his caseload not excessive. However, our discussions with the Public Defender and his staff indicate that they accept the validity of the Arizona Supreme Court's *Smith* standards as a basis for determining excessive caseloads and feel obligated to comply with them. This position is consistent with their constitutional and professional ethical duties.

Once the defender has determined that his office's caseload is excessive, the question becomes whether restructuring could create sufficient resources internally to abate the situation within a reasonable time. The likelihood of a positive answer to this question is greatly diminished by the direct consequences of increased MCPD personnel turnover and the disruptions caused by court and MCPD restructuring. The MCPD has informed the PSI study team that caseloads exceeding the *Smith* standards also exist in its other divisions, so that reassignment of resources from those areas does not constitute potential relief for the Trial Division. This is consistent with the team's recommendation that some work now handled by the Trial Division, such as special actions, be transferred to the appellate division. Thus, although the results of the experimental Trial Division reorganization are not yet available, it is unlikely that sufficient relief from its excessive caseload will be obtained quickly enough to avoid the necessity of allocating additional resources to the MCPD, at least on a temporary basis.

²⁹ See, e.g., *Doyle v. Allegheny County* (Pittsburgh PA) and other cases reflected in "Gideon's Trumpet Unclogged," *National Law Journal* (Jan. 10, 2000) p.1.